

DATE: August 29, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-11324

DECISION OF ADMINISTRATIVE JUDGE

DARLENE LOKEY ANDERSON

APPEARANCES

FOR GOVERNMENT

Martin H. Mogul, Department Counsel

FOR APPLICANT

Matthew C. Bernstein, Attorney At Law

SYNOPSIS

Applicant's criminal conduct involving an arrest and conviction for Spousal Abuse in 1996, and an arrest and conviction for Forgery and Seal of Handwriting in 2000, have not been mitigated by sufficient evidence of reform and rehabilitation. Clearance is denied.

STATEMENT OF THE CASE

On December 18, 2001, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to the Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

The Applicant responded to the SOR in writing on February 26, 2002, and requested a hearing before a DOHA Administrative Judge. This case was assigned to the undersigned on May 14, 2002. A notice of hearing was issued on May 29, 2002. The hearing was held on June 26, 2002, at which the Government presented nine exhibits. The Applicant presented twenty-two exhibits. The Applicant called two witnesses and testified on his own behalf. The official transcript (Tr.) was received on July 8, 2002.

FINDINGS OF FACT

The Applicant is 51 years old, single and has a Bachelors Degree in Chemical Engineering and an MBA in Financing Management. He is employed by a defense contractor as a Senior Data Base Engineer and is seeking to retain his Top Secret security clearance in connection with his employment.

The Government opposes the Applicant's request for a continued security clearance, on the basis of allegations set forth

in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the SOR:

Paragraph 1 (Guideline J - Criminal Conduct). The Government alleges that the Applicant is ineligible for clearance because he engaged in criminal conduct.

The Applicant and his wife were married in 1993. They experienced marital difficulties that revolved around his wife's pattern of excessive alcohol consumption. These problems escalated and resulted in their separation and divorce.

Before they separated, on February 3, 1996, the Applicant was arrested and was charged with Corporal Injury to a Spouse or Roommate. The Applicant testified that he had been playing tennis in the afternoon. He came home around dinner time and his wife had been drinking heavily. The Applicant consumed two drinks of alcohol, one before dinner and one with dinner. His wife was argumentative and belligerent. The Applicant decided that he was fed up with her behavior and decided to move out. He started loading things that he had piled near the front door into his car to move out. His wife became incensed, insisting that he stay. He ignored her. On one of his trips into the house to pick up some boxes of tax records and employment related files, his wife started grabbing the papers and throwing them up in the air. The Applicant states that he pushed past his wife to grab the box when she fell over backwards. He states that she then immediately jumped up and started screaming louder.

The Applicant continued loading his boxes and clothes until the police arrived. Her son, from a previous marriage, was upstairs in the house and had called the police. The Applicant's wife claimed that the Applicant had pushed her into the window in the front hall way and cracked it. She further claimed that her shoulder was injured as a result. The Applicant spent the night in jail, and his wife bailed him out the next morning. She promised him that she would stop drinking and go to counseling. The Applicant pled guilty to an amended charge of Battery and was sentenced to three years unsupervised probation, to perform 15 days of community service and was ordered to enroll and complete a Domestic Violence Program. The original charge was dismissed. The Applicant's probation was terminated early, all of the other sentencing requirements were satisfied, and his conviction was expunged.

Following this incident, the Applicant and his wife sought marital counseling and lived together for another year and a half before he filed for divorce in July 1997, and moved out for good. (Tr. p 79).

Since the Applicant and his former spouse lived in the same community, they traveled in the same social circles, and quite often would see or talk with one another. The Applicant states that although their relationship has not been amicable since their break up, he has been to her home on various occasions.

In August 1999, the Applicant was driving down his ex-wife's street when he stopped to talk with her son who was in the front yard washing his car. The Applicant never left his car, and was having a friendly conversation with her son, when his ex-wife came out of the house and pulled her son away from the Applicant's car.

In September 1999, the Applicant was driving down his ex-wife's street again and stopped to talk with her tenant, to get his name, for the purpose of filing a complaint against his ex-wife with the zoning commission. His ex-wife had renters on her property and Applicant's had learned from a newspaper article that it was illegal. He filed a complaint against her with the local zoning authorities to make her comply with the law. The Applicant states that in an attempt to get back at him or do harm to him, his ex-wife filed for a restraining order against him that was approved by the court. The Applicant in turn filed for a restraining order against his ex-wife, but it was denied.

On January 28, 2000, the Applicant was charged with (1) Forgery of Seal and Handwriting, a misdemeanor and (2) Disobeying a Court Order, a misdemeanor. The Applicant explained that he had told his neighbor about his ex-wife's violation of the zoning ordinance. The neighbor agreed that he would also like the tenant out. According to the Applicant, the neighbor was leaving on a boat trip the next day and had no time to file the complaint himself. The Applicant claims that the neighbor told the Applicant to file the complaint for him, in his name. The Applicant subsequently filed a complaint with the local zoning office against the Applicant's ex-wife and signed his neighbors name. During the investigation concerning this forgery, the Applicant's neighbor denied that he ever told the Applicant to file such a complaint in his name. The Applicant pled nolo contendere to Charge 1 and was sentenced to 3 years unsupervised probation, ten days community service, and was fined \$500.00. Charge 2 was dismissed. The Applicant

states that he has complied with all of the sentencing requirements. His probation was terminated early and his conviction was expunged. The temporary restraining order remains in effect until later this year.

The Applicant testified that he later learned that his neighbor was afraid of retribution from the Applicant's ex-wife, who is somewhat of a powerful woman in the local community. When the neighbor was contacted by the zoning officer, out of fear of the ex-wife, the neighbor told him that the Applicant had no permission to file such a complaint.

The Applicant further states that on two separate occasions his car was vandalized while parked, when his wife was known to be in the vicinity. The damage to his car resulting from the first incident was approximately \$400.00. The damage to his car from the second incident was approximately \$800.00. He also received long frequent annoying telephone calls and hang ups that he believes she was doing. The telephone calls stopped when he contacted the police and placed a tap on his telephone.

The Applicant states that he is presently in a committed relationship with another woman that he has been involved with for over three years. He has moved away from his ex-wife and no longer socializes in the same circles as she does. He states that he does not expect to ever become involved with his ex-wife in the future, or any other person who could cause such difficulties in his life.

Paragraph 2 (Guideline E - Personal Conduct). The Government alleges that the Applicant is ineligible for access to classified information because he has engaged in conduct involving questionable judgment, untrustworthiness and unreliability.

Accordingly, the information considered under Paragraph 1, above, will also be considered under this Guideline.

Mitigation.

The Applicant's supervisor, and program manager, both testified that the Applicant is considered reliable, trustworthy and dependable on the job. He is timely, thorough and well respected. They recommend him for a position of trust.

Numerous letters of recommendation from the Applicant's colleagues and other professional associates indicate that the Applicant is considered to be an outstanding programmer, data base designer and support staff worker. He is highly skilled and extremely knowledgeable in his field of expertise. He is considered extremely reliable and trustworthy and an asset to their organization. (Applicant's Exhibits G, H, I, J, K, M, N, O, P, Q, R, S, T, U and V).

POLICIES

Enclosure 2 and Section E.2.2. of the Directive sets forth adjudication policies divided into "Disqualifying Factors" and "Mitigating Factors." The following Disqualifying Factors and Mitigating Factors are found to be applicable in this case:

Guideline J (Criminal Conduct)

Conditions that could raise a security concern:

1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;
2. A single serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns:

None.

Guideline E (Personal Conduct)

Condition that could raise a security concern:

Conduct involving questionable judgment, untrustworthiness, unreliability or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Condition that could mitigate security concerns:

The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or pressure.

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, in evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

- a. The nature and seriousness of the conduct and surrounding circumstances
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence.

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question, posed in Section 2 of Executive Order 10865, of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

The DoD Directive states, "The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Eligibility for access to classified information is predicted upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable should be considered in reaching a determination." The Administrative Judge can draw only those inferences or conclusions that have reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order . . . shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the Applicant concerned."

CONCLUSIONS

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours per day, seven days per week. The Government is therefore appropriately concerned when available information indicates that an Applicant for clearance may be involved in instances of criminal conduct and personal conduct that demonstrates poor judgment or unreliability.

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation, which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him a security clearance.

In this case the Government has met its initial burden of proving that the Applicant has engaged in criminal conduct (Guideline J) and poor personal conduct (Guideline E). This evidence indicates poor judgment, unreliability and untrustworthiness on the part of the Applicant. Because of the scope and nature of the Applicant's conduct, I conclude there is a nexus or connection with his security clearance eligibility.

Considering all of the evidence, the Applicant has not introduced persuasive evidence in rebuttal, explanation or mitigation that is sufficient to overcome the Government's case.

The Applicant's recent criminal conduct cannot be tolerated. It cannot be successfully argued that the conduct was isolated, nor can it be blamed on the Applicant's youth and immaturity. The Applicant is 51 years old, and he was arrested and convicted on two occasions, within the last six years, most recently, just two years ago. Despite the fact that he permanently separated from his wife and filed for divorce in 1997, he obviously remained so bitter and angry about their past, that he allowed poor judgment to effect his behavior as recently as 2000, resulting in his second arrest. He states that, since this arrest he no longer has anything to do with his ex-wife, and does not foresee that his criminal conduct will occur in the future. However, given the recency of his criminal involvement, it is too early at this time to find him eligible for access to classified information. Admittedly, the Applicant has made changes in his life to improve his conduct, (moved away from his wife and no longer socializes in the same circles) since his two criminal convictions, but, there is no long track record of good judgment, reliability and trustworthiness since these arrests that demonstrates his eligibility. At the present time, it is not clearly consistent with the national interest to grant her a security clearance. Accordingly, Guidelines J (Criminal Conduct) and E (Personal Conduct) are found against the Applicant.

On balance, it is concluded that the Applicant has failed to overcome the Government's case opposing his request for a security clearance. Accordingly, the evidence supports a finding against the Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1 and 2 of the SOR.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: Against the Applicant.

Subpara. 1.a.: Against the Applicant.

Subpara. 1.b.: Against the Applicant.

Paragraph 2: Against the Applicant.

Subpara. 2.a.: Against the Applicant.

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

Darlene Lokey Anderson

Administrative Judge